IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-164

SPIEGEL, INC.,

Appellant

v.

STATE OF SOUTH DAKOTA, ex rel. MARK V. MEIER-HENRY, Attorney General for the State of South Dakota, and TRUDY PETERSON, for herself and all others similarly situated,

Appellees

On Appeal From The Supreme Court of South Dakota

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Spiegel, Inc. ("Spiegel") appeals from the final judgment of the Supreme Court of South Dakota holding that the imposition of a South Dakota finance charge limitation upon interstate retail catalog installment sales accounts did not violate the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota is reported at 277 N.W.2d 298 and also appears in the Appendix (p. A-1).

The opinion of the Circuit Court of Minnehaha County, (South Dakota Second Judicial Circuit), granting summary judgment for Spiegel, which was reversed by the Supreme Court of South Dakota, is not reported but appears in the Appendix (p. A-11).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 29, 1979. A timely petition for rehearing was denied on May 3, 1979. (Appendix, p. A-10)

A notice of appeal to this Court was filed in the Circuit Court of Minnehaha County, (South Dakota Second Judicial Circuit), which is the court possessed of the record in the case, on May 31, 1979. (Appendix, p. A-18)

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Commerce Clause (Article I, Section 8, Clause 3), United States Constitution:

> "The Congress shall have power . . . . To regulate Commerce . . . among the several states. . . ."

South Dakota Statutes:

> The South Dakota statutes involved in the case (SDCL 54-11-5-7) are set forth in full in the Appendix (p. A-15).

QUESTION PRESENTED

Whether the imposition of a South Dakota finance charge limitation upon interstate retail catalog installment sales accounts, which effectively bars such sales on an economically viable basis and is imposed retroactively as a penalty without prior notice, is an unconstitutional burden on interstate commerce.

STATEMENT OF THE CASE

Spiegel is a Delaware corporation with its principal place of business in Oak Brook, Illinois. (Appendix, p. A-2)

Spiegel has no contact with South Dakota apart from interstate catalog sales, carried out entirely by mail, with South Dakota residents. The South Dakota Supreme Court set forth the facts regarding Spiegel's contact with South Dakota as follows:

> "[Spiegel] has no office, officers, employees or agents, stores, warehouses or property in South Dakota and is not certified to do business in South Dakota. Spiegel is engaged in the business of selling merchandise by mail order and solicits sales in South Dakota by mailing catalogs to South Dakota citizens. These catalogs contain credit application forms for credit accounts and credit agreement forms for ordering merchandise. The credit application forms are signed by South Dakota citizens and sent to Spiegel in Illinois. Once the application forms are accepted by Spiegel, credit is extended to South Dakota citizens who then mail their merchandise orders to Spiegel in Illinois after filling out the credit agreement forms. Spiegel fills the orders and mails the merchandise to citizens in South Dakota. Spiegel does not take or retain a security interest in merchandise sold to South Dakota citizens." (Appendix, p. A-2)

Spiegel's credit agreements provide that they are governed by Illinois law and provide for a monthly finance charge at an annualized rate of 19.8% which is permissible under Illinois law. The South Dakota Supreme Court set forth the facts regarding Spiegel's credit agreements as follows:

> "Spiegel's revolving credit agreements provide that the buyer, by signing, promises to pay according to the contract terms set forth in the current catalog and understands that the contract is to be governed by Illinois law. The Spiegel catalog lists the finance charge on its revolving charge account agreements as 1.65%

per month which is an annual percentage rate of 19.8%. The maximum rate allowable under Illinois law is 1.8% per month which is an annual allowable rate of 21.6%. Ill. Rev. Stat. 121½ § 528." (Appendix, p. A-2)

On April 28, 1977, plaintiffs filed this case in the Circuit Court of Minnehaha County (South Dakota Second Judicial Circuit) as a class action seeking injunctive relief and the recovery of all finance charges paid to Spiegel on revolving charge accounts by plaintiff Peterson "and all others similarly situated." Such charges were claimed to be in violation of a South Dakota statute (SDCL 54-11-6) which provided that "notwithstanding any other provision of law to the contrary, the highest rate of interest which it shall be lawful for any person to take, receive, retain, or contract for in this state . . . on any revolving charge account shall be twelve per cent per annum. . . ." (Appendix, p. A-15)

Spiegel moved for summary judgment in the Circuit Court on the ground that its revolving credit agreements were governed by Illinois law and lawful thereunder. On October 3, 1977, the Circuit Court granted summary judgment for Spiegel. The Circuit Court cited the provision of the South Dakota statutes, patterned after § 1-105 of the Uniform Commercial Code, which provides that:

> "[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." SDCL 57-1-27

The Circuit Court found that the Spiegel transactions had a reasonable relation to Illinois and the Court rejected claims that the contracts were "contracts of adhesion" or "unconscionable." The Circuit Court concluded that "the contract provision calling for application of the law of

Illinois is valid and enforceable in this state." (Appendix, p. A-14)

Plaintiffs then appealed to the Supreme Court of South Dakota which, on March 29, 1979, reversed the decision of the Circuit Court. The Supreme Court acknowledged that the Spiegel contracts provided they were governed by Illinois law. However, the Court concluded that South Dakota had a "strong public policy regarding revolving charge account agreements" embodied in SDCL 54-11-6 and in an earlier South Dakota Supreme Court decision, *Rollinger* v. *J. C. Penney Company*, 86 S.D. 154, 192 N.W.2d 699 (1971), in which the Court had found that the statutory provision prohibiting interest in excess of a specified amount was applicable to finance charges on a revolving retail charge account.* The Supreme Court concluded that this strong public policy "invalidates the governing law agreement of the parties which allows for a usurious rate of interest to be taken in South Dakota and that the exaction by Spiegel of such interest in excess of the rate prescribed in SDCL 54-11-6 is unlawful." (Appendix, p. A-7)

Spiegel argued that, if the South Dakota statute were applicable to Spiegel's credit transactions, it constituted an

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* In concluding that a statutory restriction on "interest" applies to a finance charge on a revolving retail charge account, the *Rollinger* case is one of a handful of decisions, all of which are cited in the South Dakota Supreme Court's opinion in this case. (Appendix, p. A-6) Most jurisdictions do not regard an additional charge when payment of the price for goods is delayed (a so-called "time-price differential") as constituting interest. See cases summarized in Lobell & Waterman, "Consumer Credit Litigation" in *Consumer Credit 1979* (Practicing Law Institute 1979) at p. 209. The classic American decision holding that such a time-price differential does not constitute interest is *Hogg* v. *Ruffner*, 66 U.S. 115 (1861) ("Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.") (applying Indiana law).

unconstitutional burden on interstate commerce. The South Dakota Supreme Court rejected Spiegel's constitutional claim. The Court stated:

> "The rule to be applied in light of Spiegel's contention is that 'state regulations involving a legitimate local interest are not invalid because they affect interstate commerce unless the burden on such commerce is, on balance, clearly excessive in relation to the local benefits.' *Aldens, Inc.* v. *LaFollette, supra,* citing *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 1976, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55, n. 6, and *Pike* v. *Bruce Church,* 1970, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174. We have discussed the strong public policy regarding the maximum interest allowable on revolving charge account agreements and the rationale of protecting the general welfare of South Dakota citizens by prohibiting the exaction of excessive rates of interest in revolving charge account agreements. In balancing the interests, we must conclude that the South Dakota usury law embodied in SDCL 54-11-6 involves a legitimate local interest which does not place a burden on interstate commerce that is 'clearly excessive' when weighed against the local benefits and protections of the law." (Appendix, p. A-8)

Although plaintiffs had not moved for summary judgment in the trial court, the Supreme Court nevertheless instructed the Circuit Court to enter summary judgment for the plaintiffs; to issue a permanent injunction against Spiegel ordering it to cease charging rates on its revolving charge accounts in excess of the rate prescribed in the South Dakota statute; to make a determination of the amount of interest charged to plaintiff Peterson by Spiegel; and to order Spiegel to pay such amount to plaintiff under the provision of the South Dakota statute providing for forfeiture of the entire interest charge whenever a contract provides for interest in excess of the statutory maximum.* (Appendix, p. A-9)

Spiegel now appeals to this Court from the judgment of the South Dakota Supreme Court on the constitutionality of the South Dakota restriction on interstate credit sales.

HOW THE FEDERAL QUESTION WAS PRESENTED

Spiegel contended in the South Dakota Supreme Court that application of the South Dakota statute to Spiegel's credit transactions would constitute an unconstitutional burden on interstate commerce. The South Dakota Supreme Court considered and rejected Spiegel's constitutional claim in its opinion rendered March 29, 1979, as quoted above. (Appendix, p. A-8) Spiegel reiterated the constitutional

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* The significance of the injunctive aspect of this case is reduced somewhat by the fact that subsequently South Dakota amended its statute, effective July 1, 1979, to provide for charges on revolving charge accounts at an annualized rate of 18% (SDCL 54-11-7, set forth in the Appendix p. A-16); however, the statutory rate is still below the rate permissible under Illinois law and provided in the Spiegel contracts. The statutory change does not affect the portion of the decision awarding monetary relief in the form of forfeiture by Spiegel of all interest paid by plaintiff Peterson. The present case has never been certified as a class action; however, subsequent to the decision herein, another class action was filed on behalf of the same class of plaintiffs, represented by counsel for plaintiffs herein, seeking recovery of all interest paid by such plaintiff class to Spiegel. *Donald G. Siegrist, for himself and all others similarly situated,* v. *Spiegel, Inc.,* Circiut Court of Minnehaha County (South Dakota Second Judicial Circuit), Civil Action No. 79-519 (filed April 5, 1979). A similar class action has also been filed by a plaintiff, represented by the same lawyer, against another interstate retail catalog seller. *Milton C. Karli, for himself and all others similarly situated,* v. *Aldens, Inc.,* Circuit Court of Minnehaha County (South Dakota Second Judicial Circuit), Civil Action No. 79-520 (filed April 5, 1979). With respect to the imposition of 12% limitations on interstate credit sales by other states, see p. 21, *infra.*

claim in its petition for rehearing which was denied on May 3, 1979. (Appendix, p. A-10)

In the Circuit Court Spiegel had filed an answer asserting, among other defenses, that application of the South Dakota statute to Spiegel's credit transactions would constitute an unconstitutional burden on interstate commerce. Spiegel then moved for summary judgment in the Circuit Court on the ground that its agreements were governed by Illinois law and lawful thereunder. The Circuit Court granted Spiegel's motion for summary judgment on that ground and therefore had no occasion to consider the constitutional question. (Appendix, p. A-11)

THE QUESTION PRESENTED IS SUBSTANTIAL

This case presents starkly the question of whether there is *any* constitutional constraint under the Commerce Clause on the imposition by the states of finance charge limitations on interstate credit sales accounts. As discussed below, the South Dakota limitation at issue (an annualized 12%) is so severe as to effectively bar such sales on an economically viable basis. This limitation on retail sales contrasts, moreover, on a patently discriminatory basis, with a 24% annualized rate permitted under the South Dakota statute to bank credit card accounts.

Yet the South Dakota Supreme Court upheld the constitutionality of the limitation on Spiegel's interstate sales without any consideration of the burden imposed by such regulation.* In upholding such regulation without even considering the nature of the burden imposed and weighing it against the benefit of the statute, the judgment of the South Dakota Supreme Court stands in effect for the proposition that the Commerce Clause imposes no restraint whatsoever on such state limitations.

* As noted above, the South Dakota Supreme Court directed the entry of summary judgment for plaintiff even though plaintiff had not moved for summary judgment in the trial court and the trial court granted summary judgment for Spiegel on non-constitutional grounds. Thus, Spiegel never had any opportunity to present, and the South Dakota Supreme Court did not have before it, any evidence as to the nature and extent of the burden imposed by the South Dakota regulation on Spiegel's interstate credit sales.

Spiegel submits that the judgment of the South Dakota Supreme Court is wrong; that the Commerce Clause requires consideration on a factual basis of the burden imposed by such a limitation on interstate sales and a balancing of that burden against the benefits of the regulation; and that such consideration demonstrates that the limitation at issue here is an unreasonable and discriminatory one.

The constitutional question warrants review by this Court for the following reasons:

1. *The South Dakota Supreme Court upheld the limitation on Spiegel's interstate credit transactions without any consideration of the burden imposed by such regulation as mandated by this Court's Commerce Clause decisions.*

It is undisputed in this case that Spiegel's catalog sales to South Dakota residents constitute pure interstate commerce. The South Dakota Supreme Court did not dispute that Spiegel had no agents or employees, stores, offices or property in South Dakota. Spiegel merely mailed catalogs to South Dakota residents who responded, by mail, and purchased goods on a revolving credit basis. (Appendix, p. A-2) In describing similar conduct in a previous decision, this Court stated:

> "[I]t is difficult to conceive of commercial transactions more exclusively interstate than the mail order transactions here involved." *National Bellas Hess, Inc.* v. *Dep't of Revenue,* 386 U.S. 753, 759 (1967).

This Court's Commerce Clause decisions emphasize that the constitutionality of state regulation of such interstate transactions depends upon a particularized factual evaluation of the burden imposed in relation to the benefits of the

statute. Such an evaluation has been central to all of this Court's recent Commerce Clause decisions. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 439-48 (1978) (weighing against the asserted benefits of a Wisconsin regulation of truck length and configuration its impact in increasing costs and slowing service of interstate carriers); *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 348-54 (1977) (weighing against the asserted benefits of a North Carolina apple display regulation its impact in increasing the costs and harming the competitive position of Washington apple growers doing business in North Carolina); *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366, 370-78 (1976) (weighing against the asserted benefits of a Mississippi milk sale regulation its impact which "although not in terms an absolute and universal bar to sales of out-of-state milk . . . has in this case . . . in practical effect exclude[d] from distribution in [Mississippi] wholesome milk produced . . . in [Louisiana]"); *Pike* v. *Bruce Church*, 397 U.S. 137 (1970) (weighing against the asserted benefits of an Arizona fruit container regulation its impact in requiring an interstate shipper to construct a packing plant in Arizona); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524-30 (1959) (weighing against the asserted benefits of an Illinois mudguard requirement for trucks the costs imposed on interstate carriers).

In *Raymond Motor Transportation, Inc.* v. *Rice, supra*, Mr. Justice Powell's opinion for the Court made clear that such a balancing test must be applied:

> " 'In areas where activities of legitimate local concern overlap with national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make "delicate adjustment of the conflicting state and federal claims" ' [citations omitted].

> "In this process of 'delicate adjustment,' the Court has employed various tests to express the distinction between permissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." 434 U.S. at 440-41.

In *Pike* v. *Bruce Church, Inc., supra*, Mr. Justice Stewart, speaking for a unanimous Court, stated:

> "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

In *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366 (1976), Mr. Justice Brennan, also speaking for a unanimous Court, stated:

> "[T]he Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance . . ." [citations omitted]. 424 U.S. at 371.*

A similar emphasis on the need to balance, on the basis of a thorough factual evaluation, the benefits against the bur-

* The Court's opinion quotes in this context F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 33-34 (1937):

> "Adjudication 'entails emphasis upon the concrete elements of the situation that concerns both state and national interests. The particularities of a local statute touch its special aims and the scope of their fulfillment, the difficulties which it seeks to adjust, the price at which it does so. . . . [P]ractical considerations, however, screened by doctrine, underlie resolution of conflicts between state and national power'." (Quoted in 424 U.S. at 372)

dens of a statute regulating interstate transactions appears in many earlier decisions of the Court. See, *e.g., Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), in which the Court held unconstitutional an Arizona statute limiting the length of all passenger and freight trains, including interstate trains, operating in Arizona. The Court stated:

> "[T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are safeguarded by the commerce clause from state interference." 325 U.S. at 770.

In the present case there has been no consideration by the South Dakota Supreme Court of "the nature and extent of the burden" imposed by the 12% limitation on Spiegel's interstate catalog sales. The South Dakota Supreme Court, having reversed the trial court's decision that Illinois law applied to Spiegel's transactions, simply asserted *ex cathedra,* without any record or evidence on the point, that the burden of the 12% South Dakota statutory limitation was not "clearly excessive" in relation to the local interests involved, and the Court directed that summary judgment be entered for plaintiff. Since the trial court had granted summary judgment for Spiegel without reaching the constitutional question, and plaintiff had not moved for summary judgment in the trial court, Spiegel had no opportunity to present evidence on the impact of the statute.*

* Spiegel specifically advised the Court in its petition for rehearing that, if permitted to do so, "Spiegel would expect to present evidence to the effect that the practical impact of a 12% limit is to *bar* Spiegel from engaging in interstate catalog sales on credit in South Dakota." (Petition for Rehearing at p. 5)

The conclusory upholding of the 12% limitation, without a particularized factual evaluation of its impact and an opportunity for Spiegel to present evidence as to the nature of the burden imposed, is in direct violation of this Court's Commerce Clause decisions. Such summary action would be defensible only if one were to conclude that *all* state interest limitations on interstate credit transactions are permissible in light of what the South Dakota court called "the strong [South Dakota] public policy regarding the maximum interest allowable." (Appendix, p. A-7) But such a conclusion has no support in this Court's decisions which have required that even state health and safety regulations affecting interstate commerce, which involve much stronger state interests than finance charge limitations, must be subjected to particularized scrutiny under the Commerce Clause. See *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 443 ("[W]e cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce."); *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945).

There is, in fact, reason to be very skeptical about the state interest purportedly served by finance charge limitations on retail sales accounts. This skepticism is reflected in certain of this Court's decisions. See *Mourning* v. *Family Publications Service, Inc.* 411 U.S. 356 (1973) (opinion of Burger, C.J.), a decision involving truth-in-lending laws, in which this Court analyzed how merchants may effectively "bury" the cost of credit in the price of goods as follows:

> "For example, two merchants might buy watches at wholesale for $20 which normally sell at retail for $40. Both might sell immediately to a consumer who agreed to pay $1 per week for 52 weeks. In one case, the merchant might claim that the price of the watch was $40

> and that the remaining $12 constituted a charge for extending credit to the consumer. . . . The second merchant might claim that the price of the watch was $52 and that credit was free. The second merchant, like the first, has forgone the profits which he might have achieved by investing the sale proceeds from the day of the sale on. The second merchant may be said to have 'buried' this cost in the price of the item sold."* 411 U.S. at 366 n. 26.

This skepticism is shared by most economists. See *Consumer Credit in the United States,* Report of the National Commission on Consumer Finance (1972) at pp. 105-09 (citing, inter alia, various studies to the effect that "the most likely offset [when finance charges are limited on credit sales of goods] is an increase in cash prices" and concluding that "on balance, rate ceilings are undesirable when markets are reasonably competitive"). It is partly for these reasons that the vast majority of states have declined to regard a time-price differential on the credit sale of goods as a form of "interest." See cases cited in Lobell & Waterman, "Consumer Credit Litigation" in *Consumer Credit 1979* (Practicing Law Institute 1979) at p. 209.

This Court's insistence that the benefits of state regulation, as well as the burden on interstate commerce, be evaluated on a particularized factual basis was made clear in *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978), in which the Court found (at p. 429) that "the State's assertion that the challenged regulations contribute to highway safety is rebutted by appellants' evidence" and concluded (at p. 447) that the challenged regulations "can-

* As noted below, this adjustment is not possible for an interstate catalog seller which operates with the same prices in all states and, unlike local merchants, cannot adjust for a drastically lower finance charge in certain states. See p. 16, *infra.*

not be said to make more than the most speculative contribution to highway safety."

The complete failure of the South Dakota Supreme Court to analyze and evaluate on a factual basis the burden imposed by the South Dakota limitation on Spiegel's interstate credit sales and to weigh this burden against the benefits of the statute is in direct conflict with this Court's Commerce Clause decisions.*

2. *The South Dakota limitation on interstate catalog sales accounts is a discriminatory and unreasonable burden on interstate commerce.*

All available evidence indicates that a 12% finance charge limitation makes profitable retail credit sales operations impossible. See, *e.g.,* testimony of Undersecretary of the Treasury Joseph W. Barr on the Consumer Credit Protection Act, Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 90th Cong. 1st Sess., Pt. 1, p. 94

* In addition to the conflict with this Court's decisions, the South Dakota Supreme Court opinion conflicts with the decisions of various federal courts which have had occasion to consider the constitutionality under the Commerce Clause of finance charge limits on interstate credit accounts. In each of these other decisions, none of which involved limits as severe as the South Dakota 12% rate, the court, although ultimately upholding the limitation, considered factual evidence as to the extent of the burden imposed. See *Aldens, Inc.* v. *Packel,* 524 F.2d 38 (3d Cir. 1975) (upholding a 15% limitation in Pennsylvania); *Aldens, Inc. v. LaFollette,* 552 F.2d 745 (7th Cir. 1977) (upholding an 18% limitation in Wisconsin); *Aldens, Inc.* v. *Ryan,* 571 F.2d 1159 (10th Cir. 1978) (upholding an 18% limitation in Oklahoma). In each of these cases the evidence showed merely that the limitation increased costs and reduced net revenues of the interstate seller, not that it was so severe as to eliminate profitable operations altogether.

(stating, inter alia, that "[W]hen you have millions of small credit transactions—with bookkeeping charges and credit examinations and other costs—I doubt that you can make money [on retail credit sales] at much less than 18%"). See *Consumer Credit in the United States,* Report of the National Commission on Consumer Finance (1972) at p. 107 ("[A]n examination of the costs of providing credit at retail stores suggests that, even at a typical charge of 1½ percent on monthly unpaid balances, the gross finance charge does not cover the full economic cost of providing the service."; R. Shay & W. Dunkleberg, *Retail Store Credit Card Use in New York* (Studies in Consumer Credit No. 4, Graduate School of Business, Columbia University, 1975) (finding, at p. 9, that "retail stores in New York [which applies a limit of 1½% per month on balances up to $500] do not collect sufficient finance charge revenues on their revolving credit accounts to cover the costs of extending and servicing such accounts"). The only way for a retailer to deal with the impact of such a limitation on its credit sales would be to increase its prices by a sufficiently offsetting amount—which is in fact what many retailers do when faced with such a limitation. See *Mourning* v. *Family Publications Services, Inc.,* supra; G. Lynch, "Consumer Credit at Ten Per Cent Simple: The Arkansas Case," 1968 *U. Ill. L. F.* 592, 6010; *Consumer Credit in the United States,* supra, at p. 107. But Spiegel cannot increase its prices generally because it is an interstate seller competing in the national market, and Spiegel cannot increase its prices solely in the State of South Dakota because the costs of doing so for an interstate catalog seller (including the costs of reprinting catalogs) are prohibitive.

It is evident, moreover, that the draconian impact of the South Dakota laws on interstate retailers like Spiegel is not an accidental result. At the same time as South Dakota imposed the 12% limitation on Spiegel's interstate sales,

the South Dakota law permitted bank credit card accounts to charge up to 24% annual interest. SDCL 51-24-13. (Appendix, p. A-17) There is no rational basis for such a distinction. Retailers and banks are competitors in the market for retail credit. See generally, on the characteristics of this market, *Consumer Credit in the United States, supra,* at pp. 123-128; K. Axelson, "A Retailer's View of Bank Credit Cards," *Credit World* (January 1968) at p. 7. See also R. Shay & Dunkelberg, *Retail Store Credit Card Use in New York, supra,* at p. 15 (finding, inter alia, that two-thirds of retail credit cardholders held at least one bank credit card). Banks are predominantly local institutions with strong local political support. Retail sellers in South Dakota, in contrast, are predominantly interstate operators such as Spiegel; moreover, it is upon the interstate catalog sellers, who cannot adjust prices, that the adverse impact is most severe.

The effect of the South Dakota statutory pattern is to direct the extension of retail credit to the local South Dakota banks and away from the interstate retailers such as Spiegel which are forced to withdraw from the credit market if they cannot use an economically viable rate. These laws appear neutral on their face, but the Commerce Clause is not limited in impact to "the rare instance where a State artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 354 (1951). Rather, this Court has emphasized that such issues are to be decided realistically and that indications of discrimination against interstate commerce, at a minimum, place a heightened burden on the state in the balancing of interests which the Commerce Clause mandates. See *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 444-47 (1978) (finding the state's assertion of the statutory benefit "undercut by the maze of exemptions . . .

that the State itself allows" and that "exemptions of this kind . . . weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce"); *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. 333, 351-54 (1977).

3. *The burden of the South Dakota limitation is increased because it is being applied without prior notice as a retroactive penalty on Spiegel's interstate sales accounts.*

Spiegel was clearly entitled, under the South Dakota statutes and under the language of the Spiegel contracts, to assume that Illinois law would govern its contracts, as the South Dakota Circuit Court held. Yet Spiegel is now in the position of being subject to the forfeiture of *all* finance charges paid by South Dakota residents on Spiegel's interstate credit sales. The adverse impact of such regulation of interstate transactions is substantially increased when it is imposed retroactively as a penalty without notice and in disregard of settled and reasonable expectations.

The South Dakota Supreme Court acknowledged that the Spiegel contracts were lawful under Illinois law and that the contracts provided they were to be governed by Illinois law. (Appendix, p. A-2) South Dakota law contains a provision, modeled on § 1-105 of the Uniform Commercial Code, stating that:

> "Except as provided in § 57-1-28 [containing exceptions inapplicable here], when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law of either of this state or of such other state or nation shall govern their rights and duties." SDCL 57-1-27

The South Dakota Circuit Court found, and the Supreme Court did not dispute, that the transactions involved here bear a "reasonable relation" to Illinois. (Appendix, p. A-12) Spiegel had the right under the statutory choice-of-law provision to provide that its contracts would be governed by Illinois law and to proceed to do interstate business on the basis that such contractual provision would be valid.

The unfairness of the South Dakota result is evident when it is viewed in the context of state statutory developments in this area in recent years. A number of states, beginning with Pennsylvania in 1967, have imposed their own finance charge limitations on interstate catalog sales involving their residents. They have done so, however, by statutory amendment making explicit that the limitation applied, notwithstanding the absence of any contact with the state other than interstate mail contact with its residents. The Pennsylvania statutory amendment, for example, provided:

> "For the purpose of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepts or makes the offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.
>
> "Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.

> "Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of Pennsylvania from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania." 69 Pennsylvania Statutes § 1103 (effective April 1, 1967)

Subsequent to the amendment of the Pennsylvania statute, similar statutory amendments have been passed in 14 other states. See, *e.g.*, the Wisconsin and Oklahoma statutes discussed in *Aldens, Inc.* v. *La Follette*, 552 F.2d 745 (7th Cir. 1977) and *Aldens, Inc.* v. *Ryan*, 571 F.2d 1159 (10th Cir. 1978). The South Dakota statute, in contrast, was not amended and does not contain any comparable language.

The South Dakota Court determined to apply the South Dakota limitation to the Spiegel interstate contracts, notwithstanding the contractual provision providing for Illinois law to govern and the absence of any explicit statutory authority, on the basis of its assertion that South Dakota has a "strong public policy regarding revolving charge account agreements" as expressed in the statute and prior decisions applying it to intra-state transactions. (Appendix, p. A-7) There was simply no way for Spiegel or any other interstate seller to know that a South Dakota court would reach this result.

Such lack of notice is unacceptable when a state is seeking to regulate interstate commercial transactions. Although lack of notice and vagueness have been grounds for holding statutes unconstitutional primarily in cases under the First Amendment and in cases involving criminal statutes, see, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), *NAACP* v. *Button*, 371 U.S. 415 (1963), the policy which underlies such decisions applies whenever state regulation is imposing on a zone of constitutionally protected freedom, including the freedom of interstate commerce under the Commerce

Clause. Such doctrines are particularly applicable when a state is not merely regulating prospectively but is imposing a retroactive penalty, as is entailed in the forfeiture of *all* finance charges on Spiegel's credit accounts directed by the South Dakota Court.

At a minimum, in assessing the validity of state regulation of interstate commerce, the fact that regulation is imposed without adequate notice to interstate sellers is an added element of the burden imposed. In the present case, South Dakota now seeks to impose upon Spiegel, retroactively, a limitation making commercially impracticable interstate transactions in which Spiegel engaged on the reasonable assumption of their validity.

4. *The ability of a state to impose such a limitation on interstate credit sales present a threat to interstate commerce of national significance.*

This case involves the most extreme instance to date of a state-imposed limitation on interstate credit sales transactions. If South Dakota can impose a 12% limit on pure interstate transactions of this type—and certainly if it can uphold such regulation without even considering the burden imposed—then there is no meaningful constitutional restraint on such limitations.*

---

* Two other states (Washington and Minnesota) presently have 12% statutory limitations which, following the approach of the South Dakota Supreme Court in this case, might be held to be applicable to interstate retail credit sales. Two states (Connecticut and Pennsylvania) have a 15% statutory limitation. Arkansas has a constitutional 10% usury prohibition, but this provision has never been held to be applicable to interstate retail sales accounts. All other states which have statutes in this area apply a limit of at least an annualized 18% on the initial portion of any account. The statutes are collected in *CCH Consumer Credit Guide (1979)* Vols. 2-4. The Washington statute is the subject of pending litigation similar to this case. *Whittaker et. al.* v. *Spiegel, Inc.*, Superior Court of Washington for Spokane County, Civil Action No. 23544 (filed Nov. 29, 1976).

Spiegel does not contend that the mere fact that there are variations in finance charge limitations imposed by the various states represents an unconstitutional burden under the Commerce Clause. Some varying limitations have been adopted in states other than South Dakota and upheld by the courts, and are currently being complied with by Spiegel. See *Aldens, Inc.* v. *Packel,* 524 F.2d 38 (3d Cir. 1975) (upholding a 15% limitation in Pennsylvania); *Aldens, Inc.* v. *LaFollette,* 552 F.2d 745 (7th Cir. 1977) (upholding an 18% limitation in Wisconsin); *Aldens, Inc.* v. *Ryan,* 571 F.2d 1159 (10th Cir. 1978) (upholding an 18% limitation in Oklahoma).*

A 12% limitation, in contrast, would prevent Spiegel from doing business in a state altogether. Indeed such a statute has precisely the same impact as one which on its face purported to bar any interstate catalog credit sales in the State of South Dakota. Such a drastic burden has not been upheld in any case.

As indicated by the number of recent cases adjudicating the validity of such limitations on interstate credit sales, the question of their constitutionality is one of continuing significance. This Court should review the decision of the South Dakota Supreme Court in this case to make clear to the states (a) that the constitutionality of such limitations cannot be determined without a particularized factual evaluation of the burdens involved in relation to the benefits of the regulation and (b) that a limitation which effectively

* In each of these cases (a) the statute by its explicit terms was made applicable to interstate mail-order transactions and (b) the courts considered factual evidence of the burden imposed by the limitation on the interstate seller. The present case differs in both of these respects, in addition to involving a much more severe limitation, as discussed above.

bars interstate catalogue sellers from doing business in the state on an economically viable basis while favoring local credit institutions, imposed without prior notice, is an unconstitutional burden on interstate commerce.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal or summarily reverse and remand the decision below for a factual evaluation of the burden imposed on Spiegel in relation to the benefits of the regulation of interstate credit sales at issue herein.

Respectfully submitted,

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Of Counsel:
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Sioux Falls, South Dakota 57102

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, ex rel.
MARK V. MEIERHENRY (successor
in office to William J. Janklow),
Attorney General for the State of
South Dakota, and TRUDY PETERSON,
for herself and all others similarly situated,

Plaintiffs and Appellants,

vs.

SPIEGEL, INC.,

Defendant and Respondent.

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD BRAITHWAITE,
Judge

GALE E. FISHER of
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BECKER & FISHER
Sioux Falls, South Dakota

STEVEN L. ZINTER
Assistant Attorney General
Pierre, South Dakota

on the brief:

WILLIAM J. JANKLOW
Attorney General
Pierre, South Dakota

Attorneys for plaintiffs and appellants.

TIMOTHY J. NIMICK of
WOODS, FULLER, SHULTZ &
SMITH
Sioux Falls, South Dakota

Attorneys for defendant and respondent.

Argued October 13, 1978
Opinion filed March 29, 1979

DUNN, Justice (on reassignment).

This case involves an action to recover allegedly usurious interest paid under a revolving charge account agreement and to enjoin the violation of South Dakota's usury laws. Plaintiff Attorney General of South Dakota and plaintiff Peterson (plaintiffs) appeal from an order of the trial court granting summary judgment for defendant Spiegel, Inc. (Spiegel). We reverse and remand.

Spiegel is a Delaware corporation with its principal place of business in Oak Brook, Illinois. It has no office, officers, employees or agents, stores, warehouses or property in South Dakota and is not certified to do business in South Dakota. Spiegel is engaged in the business of selling merchandise by mail order and solicits sales in South Dakota by mailing catalogs to South Dakota citizens. These catalogs contain credit application forms for credit accounts and credit agreement forms for ordering merchandise. The credit application forms are signed by South Dakota citizens and sent to Spiegel in Illinois. Once the application forms are accepted by Spiegel, credit is extended to South Dakota citizens who then mail their merchandise orders to Spiegel in Illinois after filling out the credit agreement forms. Spiegel fills the orders and mails the merchandise to citizens in South Dakota. Spiegel does not take or retain a security interest in merchandise sold to South Dakota citizens.

Spiegel's revolving credit agreements provide that the buyer, by signing, promises to pay according to the contract terms set forth in the current catalog and understands that the contract is to be governed by Illinois law. The Spiegel catalog lists the finance charge on its revolving charge account agreements as 1.65% per month which is an annual percentage rate of 19.8%. The maximum rate allowable under Illinois law is 1.3% per month which is an annual

allowable rate of 21.6%. Ill.Rev.Stat. 121½ § 528. South Dakota law limits the annual rate of interest on a retail revolving charge account to 12%. SDCL 54-11-6.

On April 28, 1977, plaintiffs initiated this action to recover interest paid by plaintiff Peterson to Spiegel contrary to South Dakota usury laws and to permanently enjoin the violation of South Dakota usury laws. The issue presented by the pleadings before the trial court was whether the South Dakota usury limit of 12% or the Illinois limit of 21.6% applies to Spiegel's revolving charge account agreements with South Dakota citizens. Spiegel moved for summary judgment on the basis that the substantive law of Illinois applied to the controversy between the parties and that the agreements involved were valid under Illinois law. On October 5, 1977, after reviewing the pleadings, affidavits of the parties, and exhibits, the trial court granted the motion for summary judgment and dismissed the plaintiff's complaint.

The issue presented by this action is simply which substantive law—that of Illinois or that of South Dakota—applies to the Spiegel revolving charge account agreements.[1] In the revolving charge account agreements, the parties agreed to be bound by the substantive law of Illinois. As stated above, the rate of interest charged in the revolving credit agreement is lawful if the law of Illinois applies but would be usurious if South Dakota law applies. Generally, parties to a contract may effectively agree to be

[1] Plaintiffs urge us to consider State ex rel. Turner v. First of Omaha Serv., 1978, Iowa, 269 N.W.2d 409. Contra, Marquette Nat. Bank v. First of Omaha Corp., 1978, U.S. , 99 S.Ct. 540, 58 L.Ed.2d 534. These cases involve interpretations of the National Bank Act interest provision codified in 12 U.S.C.A. § 85. The pervasive nature of the federal law regarding interest rates charged by national banks is clearly distinguishable from the present situation under consideration.

bound by the law of a particular state, but such governing law agreements are subject to limitation and invalidation by the overriding public policy of the forum state. Forney Industries, Inc. v. Andre, 1965, D.C.N.D., 246 F.Supp. 333, 334, quoting 16 Am.Jur.2d, Conflict of Laws, § 46; Trinidad Industrial Bank v. Romero, 1970, 81 N.M. 291, 466 P.2d 568, 571-572.

This court has discussed at great length the principle that public policy considerations can render contract provisions unenforceable in Bartron v. Codington County, 1942, 68 S.D. 309, 2 N.W.2d 337, wherein it was stated that

> "[p]ublic policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good." 68 S.D. at 322, 2 N.W.2d at 343.

The legislature has also addressed the public policy principle in statutory form. Any contract which directly or indirectly exempts anyone from violation of the law, whether willful or negligent, is deemed to be against the policy of the law (SDCL 53-9-3) and any contract provision which is contrary to an express statute or to the policy of an express statute is unlawful (SDCL 53-9-1). See Schurr v. Weaver, 1952, 74 S.D. 378, 53 N.W.2d 290. Therefore, foreign laws will not be given effect if, by doing so, contract provisions would be enforced which would be contrary to the settled public policy of the domestic forum. Mechanics & Metals Nat. Bank v. Smith, 1927, D.C.S.D., 21 F.2d 128; Mirgon v. Sherk, 1938, 196 Wash. 690, 84 P.2d 362. The rationale behind the public policy limitation on the enforcement of governing law agreements is that

> "'freedom of contract is not an absolute right or superior to the general welfare of the public. It is subject to reasonable restraint and regulation by the state, under the police power, to protect the safety, health, morals, and general welfare of the people.'" Siefkes v. Clark Title Co., 1974, 88 S.D. 81, 88, 215 N.W.2d 648, 651-652, quoting State v. Nuss, 1962, 79 S.D. 522, 114 N.W.2d 633.

The primary sources for declarations of the South Dakota public policy in areas such as the one presently under consideration are the constitution, statutory law and judicial decisions. Marchlik v. Coronet Insurance Company, 1968, 40 Ill.2d 327, 239 N.E.2d 799; 17 C.J.S. Contracts § 211b, p. 1018; 6A Corbin on Contracts § 1375, p. 15. South Dakota's general usury law is found in the debtor and creditor title of the code at SDCL 54-3-7. In addition to this general provision, the legislature has enacted a separate and distinct chapter regulating the maximum allowable interest rates on revolving charge accounts. Included in that chapter is a provision which reads as follows:

> "Notwithstanding any other provisions of law to the contrary, the highest rate of interest which it shall be lawful for any person to take, receive, retain, or contract for in this state pursuant to the provisions of § 54-11-5 on any revolving charge account shall be twelve per cent per annum, and at the same rate for a shorter time, and in the computation of interest, the same may be compounded." SDLC 54-11-6.

This statute is a legislative expression of the public policy of South Dakota. 91 C.J.S. Usury § 5c, p. 570. There is also a strong judicial expression of this public policy embodied in Rollinger v. J. C. Penney Company, 1971, 86 S.D. 154, 192 N.W.2d 699, in which we stated that "the use of revolving charge account agreements which result in charges exceeding maximum legal interest in this state are in violation of our usury statutes and subject to applicable penalties." 86 S.D. at 164, 192 N.W.2d at 705.

The Spiegel revolving charge account is nearly identical in form to the one we analyzed in the *Rollinger* case and we

deem *Rollinger* to be controlling in the present action. Looking through the form of the transaction to its substance, the monthly "finance charge" in the Spiegel agreement is, in fact, interest as defined in SDCL 54-3-1.[2] In accordance with the forbearance theory analysis in *Rollinger*, we conclude that the exaction of 1.65% per month by Spiegel is usurious as it constitutes (1) a loan or forbearance, either express or implied, of money or its equivalent; (2) an understanding between parties that the principal is to be repaid absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law which may be inferred from the contract itself. See State v. J. C. Penney Co., 1970, 48 Wis.2d 125, 179 N.W.2d 641; State ex rel. Turner v. Younker Brothers, Inc., 1973, Iowa, 210 N.W.2d 550; Rathbun v. W. T. Grant Company, 1974, 300 Minn. 223, 219 N.W.2d 641; Annot. 41 A.L.R.3d 682. See also, Lloyd v. Gutgsell, 1963, 175 Neb. 775, 124 N.W.2d 198; Sloan v. Sears, Roebuck & Co., 1957, 228 Ark. 464, 308 S.W.2d 802.

The purpose of the usury law embodied in SDCL 54-11-6 is to protect the general welfare of South Dakota citizens by preventing the exaction of excessive rates of interest in revolving charge account agreements. To permit the governing law agreement between the parties to control the determination of whether or not South Dakota substantive law will apply would allow a foreign corporation the privilege of conducting its business in South Dakota upon more favorable conditions than are afforded to South Dakota corporations and would provide an effective means of circumventing legislation designed to protect citizens of South Dakota. This is clearly against the express public policy

[2] SDCL 54-3-1 reads as follows: "Interest is the compensation allowed for the use, or forbearance, or detention of money or its equivalent."

of this state as embodied in SDCL 54-11-6 and *Rollinger*, supra. Therefore, we hold that the strong public policy in South Dakota regarding maximum interest rates allowable in revolving charge account agreements invalidates the governing law agreement of the parties which allows for a usurious rate of interest to be taken in South Dakota and that the exaction by Spiegel of such interest in excess of the rate prescribed in SDCL 54-11-6 is unlawful.

Spiegel contends that Anderson v. Taurus Financial Corp., 1979, S.D., 268 N.W.2d 486, is applicable to this action. In *Anderson*, we held that the validity of a sale and leaseback agreement of office equipment and furniture entered into by a South Dakota physician and a California corporation would be measured by the laws of California, where the last act for the validity of the contract occurred and where periodic payments were due. We viewed the contract as a promissory note and applied case authority regarding such installment loans. Our holding was in line with neighboring jurisdictions as to the validity of interest provided in promissory notes and payable outside of the forum state. See, Exchange Bank & Trust Co. v. Tamerius, 1978, 200 Neb. 307, 265 N.W.2d 847; Grady v. Denbeck, 1977, 198 Neb. 31, 251 N.W.2d 864; First National Bank of Wibaux v. Dreher, 1972, N.D., 202 N.W.2d 670. We did not recognize a strong public policy in regard to these types of contracts, although we made our conclusions subject to the restrictions of SDCL 54-6-42. We further viewed the contract in light of the particular circumstances involved where the physician "was not making these arrangements because he was lacking any of the necessities of life but simply because he was seeking some savings on his federal income taxes." 268 N.W.2d at 489. In light of the strong public policy regarding revolving charge account agreements as expressed in SDCL 54-11-6 and the *Rollinger* case, we do not deem the *Anderson*

case to be persuasive authority for a holding contrary to our holding above.

Spiegel further contends that South Dakota's regulation of interest rates on revolving charge account agreements restricts the transaction of Spiegel's business conducted wholly in interstate commerce and that such restriction is unconstitutional under the commerce clause of Article I, § 8 of the United States Constitution. This same contention was considered and rejected by three United States Courts of Appeal. Aldens, Inc. v. Ryan, 1978, 10 Cir., 571 F.2d 1159; Aldens, Inc. v. LaFollette, 1977, 7 Cir., 552 F.2d 745, cert. den. U.S. , 98 S. Ct. 236, 54 L.Ed.2d 161; Aldens, Inc. v. Packel, 1975, 3 Cir., 524 F.2d 38, cert. den. 425 U.S. 943, 96 S. Ct. 1684, 48 L.Ed.2d 187. We reach the same conclusion as did those three courts. The Aldens cases point out that although the Congress has acted comprehensively in the field of retail installment credit in the Federal Truth in Lending Act (15 U.S.C.A. §§ 1601-65), it has expressly deferred to the states on the matter of maximum interest rates in consumer credit transactions. 15 U.S.C.A. § 1610(b). The rule to be applied in light of Spiegel's contention is that "state regulations involving a legitimate local interest are not invalid because they affect interstate commerce unless the burden on such commerce is, on balance, clearly excessive in relation to the local benefits." Aldens, Inc. v. LaFollette, supra, citing Great Atlantic & Pacific Tea Co. v. Cottrell, 1976, 424 U.S. 366, 96 S. Ct. 923, 47 L.Ed.2d 55, n. 6, and Pike v. Bruce Church, 1970, 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed.2d 174. We have discussed the strong public policy regarding the maximum interest allowable on revolving charge account agreements and the rationale of protecting the general welfare of South Dakota citizens by prohibiting the exaction of excessive rates of interest in revolving charge account agreements. In balancing the interests, we must conclude that the South Dakota

usury law embodied in SDCL 54-11-6 involves a legitimate local interest which does not place a burden on interstate commerce that is "clearly excessive" when weighed against the local benefits and protections of the law.

On the basis of our discussion and holding above, we conclude that the trial court committed reversible error when it found that Spiegel was entitled to judgment as a matter of law and granted summary judgment for Spiegel. Our holding compels the opposite conclusions, i.e., that plaintiffs are entitled to judgment as a matter of law. Therefore, the summary judgment of the trial court is reversed and the case is remanded to the trial court with instructions to enter summary judgment for plaintiffs,[3] to issue a permanent injunction pursuant to SDCL 21-8 against Spiegel ordering it to cease charging rates on its revolving charge account agreements in excess of the rate prescribed in SDCL 54-11-6, to make a determination pursuant to SDCL 54-11-7 as to the amount of interest which was charged to plaintiff Peterson by Spiegel, and to order Spiegel to pay such amount to Peterson.

The summary judgment of the trial court is reversed and remanded with instructions.

WOLLMAN, Chief Justice, and HENDERSON and FOSHEIM, Justices, and BERNDT, Circuit Judge, concur.

BERNDT, Circuit Judge, sitting for MORGAN, Justice, disqualified.

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[3] Although plaintiffs did not make a motion for summary judgment, we have held that granting relief not specifically requested is proper where the relief so granted is consistent with the case proven at trial. See Miller v. Scholten, 1979, S.D., 273 N.W.2d 757, and the South Dakota authority cited therein. In fact, there is a statutory duty to render final judgment granting "relief to which the party in whose favor it is rendered is entitled." SDCL 15-6-54(c). See also, Annot., 48 A.L.R.2d 1188, Summary Judgment Against Movant, § 3. Summary judgment for plaintiffs is such a final judgment.

SUPREME COURT OF SOUTH DAKOTA

OFFICE OF

Gloria J. Engel, clerk

Dorothy A. Smith, deputy

Pierre

57501

May 3, 1979

Mr. Roger D. Moan
Minnehaha County Clerk of Courts
Sioux Falls, South Dakota 57501

Re: # 12385, State of South Dakota,
ex rel. Mark V. Meierhenry, et al.
v. Spiegel, Inc.

Dear Roger:

Please be advised that the petition for rehearing has been denied.

• • •

Very truly yours,

Dorothy A. Smith

copies:
The Honorable Mark V. Meierhenry
Mr. Gale E. Fisher
Mr. Timothy J. Nimick

CIRCUIT COURT OF SOUTH DAKOTA

SECOND JUDICIAL CIRCUIT

Sioux Falls, South Dakota 57102

Phone 336-2350 Ext. 52

October 3, 1977

Mr. Gale Fisher
Attorney at Law
412 West 9th
Sioux Falls, S. D. 57104

Mr. H. L. Fuller
Attorney at Law
310 South 1st
Sioux Falls, S. D. 57102

RE: State ex rel. Janklow et al.
vs. Spiegel

Dear Counsel:

Spiegel is a foreign corporation which conducts a catalog sales business in various states—including South Dakota. One of the services available to its customers is a revolving charge account. This class action asserts that the interest rate on those revolving charge accounts violates South Dakota usury laws and asks for certain affirmative relief.

Spiegel has moved for a Summary Judgment based upon the pleadings and the affidavit of one of its officers. It contends that the law of Illinois—rather than of South Dakota—is to be used in determining whether the interest is usurious. The parties concede that if South Dakota law applies, the interest rate is usurious; if Illinois law applies, it is not. So the very narrow issue presented to this court is whether the law of Illinois or of South Dakota is applicable.

APPLICABILITY OF SDCL 57-1-27

This section of our Code is UCC § 1-105 and insofar as applicable states:

> "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."

Plaintiffs contend this section has no application because SDCL 57-2-2 provides the UCC does not impair or repeal any statute regulating sales to consumers. That is simply an incorrect reading of that statute. It says *chapters 57-2 through 57-8* do not impair or repeal. That leaves 57-1-27 standing because it does not appear in any of those chapters.

Thus, under our law, the parties can agree that their rights will be governed by the law of Illinois if the transaction bears a *reasonable relation* to Illinois.

IS THERE REASONABLE RELATION TO ILLINOIS

The statute acknowledges that a transaction may have a relationship to more than one state. It does not limit the parties choice to that state which bears the most reasonable relationship. If there are several states to which the transaction bears a reasonable relationship, the parties may pick any one. It is my opinion the transaction bears a reasonable relation to the State of Illinois. Spiegel has its principal place of business there; perspective customers credit applications are approved there; shipments generally originate there; delivery of the goods (as distinguished from customer acceptance of them) occurs there. A strong argument can be made that any one of these factors is sufficient to qualify the transaction as one bearing a reasonable relation to Illinois; all four of them definitely qualify it. Even if

the last factor is discarded on the theory that delivery does not occur until there is acceptance in South Dakota, there is still a reasonable relation to Illinois.

CONTRACT OF ADHESION

Plaintiffs allege that Spiegel's revolving charge account is offered on a "take-it-or-leave-it" basis; that there is unequal bargaining power between the parties and the customers in South Dakota have no real choice.

Certainly Spiegel does not give the customers a chance to negotiate on the interest rate. But neither does Weatherwax allow a customer to negotiate on the price of a suit; if he wants it he has to pay their price. The contracts of adhesion which our courts abhor are ones where the consumer cannot go elsewhere and get comparable goods without being faced with the same contract provision. Plaintiffs, in their brief point out there are dozens of other catalog companies operating in South Dakota whose revolving charge accounts bear an interest rate within the South Dakota usury laws. So the customer does have a choice.

UNCONSCIONABILITY

Our statute providing a maximum of 12% interest on revolving charge accounts is a legislative statement of public policy for South Dakota. It is not a statement that any interest in excess of that amount is unconscionable so that it would be against our public policy to enforce it. It becomes a matter of degree. Fifty per cent I would find clearly unconscionable; 12½% clearly not. I am faced here with roughly 19%. I do not believe that is unconscionable—especially when our legislature in small loan situations allows interest up to 30%.

CONCLUSION

I find that the contract provision calling for application of the law of Illinois is valid and enforceable in this state. The Motion for Summary Judgment is granted. Counsel for defendant will prepare and submit to the Court an Order no later than October 6th.

Yours very truly,

RICHARD BRAITHWAITE
Richard Braithwaite
Circuit Judge

SOUTH DAKOTA COMPILED LAWS, §§ 54-11-5-7

54-11-5. "Revolving charge account" and "consumer goods and services" defined. For the purpose of this chapter, "revolving charge account" shall mean an arrangement prescribing terms of transactions which may be made thereunder from time to time pursuant to which a retail seller or person who offers and provides any services gives to a purchaser or user of services the privilege of using a credit card or other means of credit confirmation or identification primarily for the purpose of purchasing consumer goods or services, as that term is hereafter defined, from any person, which may include the retail seller or provider of services, and under which an interest charge may be periodically imposed.

For the purpose of §§ 54-11-5 to 54-11-8, inclusive, "consumer goods and services" mean all goods and services provided to the public by sellers or providers of personal services.

54-11-6. Maximum interest rate on revolving charge account—Computation. Notwithstanding any other provisions of law to the contrary, the highest rate of interest which it shall be lawful for any person to take, receive, retain, or contract for in this state pursuant to the provisions of § 54-11-5 on any revolving charge account shall be twelve per cent per annum, and at the same rate for a shorter time, and in the computation of interest, the same may be compounded.*

* Effective July 1, 1979, § 54-11-6 was repealed by S. B. 32, South Dakota Laws 1979 (approved February 13, 1979) and § 54-11-7 was amended to change the phrase "simple interest" to "credit service charge" and to change the rate of "twelve percent per annum" to "one and one-half percent per month." Such amendment does not yet appear in the official codification but is set forth in *CCH Consumer Credit Guide* ¶¶ 6082-83.

54-11-7. Excessive charges as misdemeanor—Forfeiture of interest—Recovery or setoff of interest already paid. Any person who charges, contracts or receives a greater rate of simple interest than twelve per cent per annum* as provided in § 54-11-6 shall be subject to the provisions of §54-3-9 and forfeit the whole of said interest so contracted to be received, and shall be entitled only to receive the principal sum due, and if any part of such interest shall have been paid it may be recovered in an action for that purpose, or set off in an action to recover such principal.

54-11-8. Bank loan accounts unaffected. The provisions of §§ 54-11-5 to 54-11-7, inclusive, shall not apply to a revolving loan account arrangement made by a bank pursuant to § 51-24-12.

SOUTH DAKOTA COMPILED LAWS, 51-24-12-13

51-24-12. Revolving credit authorized. A bank may extend credit through a revolving loan account arrangement with a debtor pursuant to which the bank may permit the debtor to obtain loans from time to time by cash advances, by the purchase or satisfaction by the bank of obligations of the debtor incurred pursuant to a credit card, or otherwise under a credit card, check-credit or other similar credit plan. The bank shall supply to such debtor a statement setting forth the maximum amount or rate of the finance charge permitted to be charged, collected, or received pursuant to § 51-24-13 and such further information as the commission by rule might require before such charges are made.

* Effective July 1, 1979, § 54-11-6 was repealed by S. B. 32, South Dakota Laws 1979 (approved February 13, 1979) and § 54-11-7 was amended to change the phrase "simple interest" to "credit service charge" and to change the rate of "twelve percent per annum" to "one and one-half percent per month." Such amendment does not yet appear in the official codification but is set forth in *CCH Consumer Credit Guide* ¶¶ 6082-83.

51-24-13. Revolving credit service charges. A bank may collect a credit service charge for extensions of credit made pursuant to § 51-24-12, subject to the following:

(1) A charge may be made in each billing cycle which is a percentage of an amount no greater than the average daily balance of the account, which credit service charge on bank credit cards shall not be imposed until the twenty-sixth day following the closing data of the billing cycle;

(2) If the billing cycle is monthly, the charge may not exceed two per cent of that part of the amount pursuant to subdivision (1) of this section, which is five hundred dollars or less and one and one-half per cent on that part of this amount which is more than five hundred dollars. If the billing cycle is not monthly, the maximum charge is that percentage which bears the same relation to the applicable monthly percentage as the number of days in the billing cycle bears to thirty. For the purposes of this section, a variation of not more than four days from month to month is "approximately the same day of the billing cycle"; and

(3) If there is an unpaid balance on the date as of which the credit service charge is applied and the credit service charge pursuant to this section is less than the minimum charge, a minimum charge not exceeding one dollar may be made if the billing cycle is monthly, or, if the billing cycle is not monthly, a minimum charge which bears the same relation to one dollar as the number of days in the billing cycle bears to thirty may be made.

STATE OF SOUTH DAKOTA } ss.
COUNTY OF MINNEHAHA }

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, ex rel. MARK V. MEIERHENRY (successor in office to William J. Janklow), Attorney General for the State of South Dakota, and TRUDY PETERSON, for herself and all others similarly situated, *Plaintiffs,* vs. SPIEGEL, INC. *Defendant.*	CIV. 77-627 NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Spiegel, Inc., the defendant above named, hereby appeals to the Supreme Court of the United States from the denial of a Petition for Rehearing in the Supreme Court of the State of South Dakota entered on the 3rd day of May, 1979 and from the decision of the Supreme Court of the State of South Dakota of March 29, 1979 and appearing at 277 N.W.2d 298.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).*

Dated this 31st day of May, 1979.

WOODS, FULLER, SCHULTZ & SMITH

By /s/ TIMOTHY J. NIMICK
Timothy J. Nimick
Attorneys for Defendant
310 South First Avenue
Sioux Falls, South Dakota 57102

* The Notice of Appeal filed May 31, 1979 contained a typographical error in the statutory citation which was corrected in a corrected notice filed July 27, 1979.

In The

Supreme Court of the United States

October Term, 1979

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No. 79-164

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SPIEGEL, INC.,

Appellant,

vs.

STATE OF SOUTH DAKOTA, ex rel. MARK V. MEIERHENRY, Attorney General for the State of South Dakota, and TRUDY PETERSON, for herself and all others similarly situated,

Appellees.

—o—

On Appeal from the Supreme Court of South Dakota

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MOTION TO DISMISS APPEAL

—o—

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STATEMENT

This is a direct appeal from a Judgment of the South Dakota Supreme Court holding that Appellant's revolving charge account interest rates violated South Dakota law as established by SDCL 54-11-6, and remanding the case to the Trial Court with instructions to issue a permanent injunction ordering Spiegel to cease charging interest rates on its revolving charge account agreements in excess of the rate prescribed by SDCL 54-11-6, which statute has since been amended and currently authorizes Appellant to charge 18% per annum on revolving charge accounts, and further directing Appellant to reimburse the plaintiff Trudy Peterson for the few dollars of interest which it had collected from her.

Appellant Spiegel, Inc. ("Spiegel") filed a direct appeal to this Court under the provisions of 28 U. S. C. § 1257 (2), and the appeal was docketed in this Court on the 1st day of August, 1979.

Spiegel claims that the South Dakota rate of interest on revolving charge accounts is an unconstitutional burden on interstate commerce, principally for the reason that Spiegel claims that it cannot make any money on a 12% interest rate, and that the South Dakota interest rates should be higher or non-applicable. Spiegel asserts that this claim constitutes a substantial federal question.

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ARGUMENT

The appeal herein fails to present a substantial federal question for the following reasons:

South Dakota's interest rate on revolving charge accounts does not impose any unreasonable burden on interstate commerce.

In its Jurisdictional Statement, Spiegel argues that a legal interest rate of 12% per annum on revolving charge accounts is so severe a limitation as to effectively bar sales within South Dakota by Spiegel. Spiegel is apparently the only national merchandiser who shares this view, because the South Dakota Supreme Court quite obviously recognized and took judicial notice of the fact that many other national retailers who offer revolving credit operate within the law and have not been effectively barred from sales within South Dakota. These national merchandising entities include Sears, Roebuck & Co., Montgomery Ward, J. C. Penney Company, Mobil Oil Corporation, Phillips Petroleum, Standard Oil, Kerr-McGee, Texaco, and many others. Quite frankly, in many small, rural South Dakota communities, the three major national retail stores (Sears, Wards and Penneys) conduct only a catalog sales outlet. And yet these national stores operate within the limits of South Dakota law. This is precisely what the South Dakota Supreme Court had reference to in its opinion in this case where it stated:

> "To permit the governing law agreement between the parties to control the determination of whether or not South Dakota substantive law will apply would allow a foreign corporation the privilege of conducting its business in South Dakota upon more favorable condi-

> tions than are afforded to South Dakota corporations and would provide an effective means of circumventing legislation designed to protect citizens of South Dakota. . . ." (Appellant's Jurisdictional Statement, Appendix, p. A-6)

Spiegel apparently concedes that the decision of the South Dakota Supreme Court no longer presents a substantial federal question, by stating that the significance of the South Dakota Supreme Court's decision is reduced by the fact that the South Dakota Legislature has amended the statutes under attack, effective July 1, 1979, so as to change the rate of interest on revolving charge accounts from 12% to 18% per annum. Thus, Spiegel at this very moment is charging and collecting 18% per annum interest on its revolving charge accounts, and arguing to this Court that it needs 19.6% per annum to operate on ". . . an economically viable basis." Appellee submits that these facts on their face demonstrate that this case does not present a substantial federal question.

The second point raised by Spiegel in its Jurisdictional Statement is that the 12% finance charge limitation makes profitable retail credit sales operations impossible, but its argument under this point is one which is more appropriately addressed to the South Dakota Legislature. Apparently this same argument was made to the South Dakota Legislature in 1979, and accepted by that body because the law was in fact changed, and at the present time the Appellant operates within the State of South Dakota on the same or similar basis that it operates in dozens of other states *without objection*. Thus, it would appear that the issue as to the injunctive relief granted by the South Dakota Supreme Court is moot. Insofar as the order directing Spiegel to reimburse Trudy Peterson for the few dollars of interest it collected from her, it can hardly be said that this portion of the judgment raises a "substantial federal question". In summary, the Appellant's argument under this point is directed towards legislative policy, and Spiegel wants this Court to legislate interest rates in South Dakota under the guise of a "commerce clause" argument.

The third point raised by Appellant is that the burden upon interstate commerce is increased because Spiegel did not have prior notice of the application of South Dakota interest limitations on revolving charge accounts, and the judgment of the South Dakota Supreme Court acts as a retroactive penalty upon Spiegel. In making this argument, Spiegel completely ignores the clear, concise language of the South Dakota Supreme Court in its 1971 decision in *Rollinger v. J. C. Penney Company*, 86 S. D. 154, 192 N. W. 2d 699, at 705:

> "Hence, we give the caveat that from and after the date of this opinion, the use of revolving charge account agreements which result in charges exceeding maximum legal interest in this state are in violation of our usury statutes and subject to applicable penalties."

Rather than heed the warning of the Court, and comply with the law as hundreds of other retailers using credit did, Spiegel set about devising a document which it hoped could circumvent the mandate of the Court. By utilizing form over substance, Appellant clearly assumed the risk of the predicament in which it finds itself. It now seeks the assistance of this Court in extricating itself from this predicament.

CONCLUSION

For the foregoing reasons, Appellee moves that this Appeal be dismissed, and we respectfully submit that the questions presented by Appellant are clearly insubstantial and that the judgment of the Supreme Court of South Dakota should be affirmed.

Dated this 16th day of August, 1979.

Respectfully submitted,

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I. NOTHING IN THE OPINION OF THE SOUTH DAKOTA SUPREME COURT OR IN THE RECORD BELOW SUPPORTS APPELLEES' ASSERTION THAT OTHER INTERSTATE RETAILERS CAN ENGAGE IN CREDIT SALES UNDER A 12% FINANCE CHARGE LIMITATION ON AN ECONOMICALLY VIABLE BASIS.

In response to Spiegel's contention that the South Dakota 12% finance charge limitation imposes an unreasonable burden on interstate commerce because it is so severe as to effectively bar interstate credit sales on an economically

viable basis, Appellees assert that "Spiegel is apparently the only national merchandiser who shares this view, because the South Dakota Supreme Court quite obviously recognized and took judicial notice of the fact that many other national retailers who offer revolving credit operate within the law and have not been effectively barred from sales within South Dakota." Motion to Dismiss Appeal at p. 3. There is absolutely nothing in the opinion of the South Dakota Supreme Court to indicate that it took "'judicial notice" of any such "fact." Nor is there anything in the record below on this point.

Indeed, it is the failure of the South Dakota court to make any factual inquiry into the impact of the South Dakota limitation which, Spiegel submits, is in direct contradiction with this Court's Commerce Clause decisions and, in itself, warrants reversal of the decision below. It is no response to the failure of the South Dakota court to make this constitutionally-mandated inquiry for Appellees to attempt now to make factual assertions which might have been made, and tested, if the South Dakota court had made the inquiry which the Constitution mandates.

Further, all published studies, of which judicial notice may be taken, indicate that profitable retail credit sales operations are impossible at a 12% rate. See Jurisdictional Statement at pp. 15-16. If any interstate seller is engaged in credit sales with a 12% finance charge, factual inquiry would demonstrate, Spiegel submits, that such seller is either adjusting its prices (which is impossible for an interstate catalog seller such as Spiegel) or is making credit sales on an unprofitable basis for other reasons such as maintenance of customer goodwill in connection with non-credit sales.

Appellees argue that the impact of the South Dakota finance charge limitation on interstate sellers such as Spiegel

raises merely an issue of "legislative policy." Motion to Dismiss Appeal at p. 4. On the contrary, the impact of a limitation on interstate sales raises a constitutional question under the Commerce Clause, which requires an assessment and a balancing of any such adverse impact against the benefits of the limitation. See Jurisdictional Statement at pp. 9-15. The need for such inquiry is heightened in this case because of the patently discriminatory differential, which Appellees make no effort to justify, between the 12% limit and the 24% rate allowed to the predominantly local bank industry on its credit cards. See Jurisdictional Statement at pp. 16-18.

II. THE AMOUNT OF MONEY INVOLVED IN THIS CASE HAS NO BEARING ON THE SUBSTANTIALITY OF THE CONSTITUTIONAL QUESTION RAISED.

Appellees assert that "insofar as the order [of the South Dakota Supreme Court] directing Spiegel to reimburse Trudy Peterson for the few dollars of interest it collected from her [in excess of the 12% limitation applicable in South Dakota until July 1, 1979], it can hardly be said that this portion of the judgment raises a 'substantial federal question.'" Motion to Dismiss Appeal at pp. 4-5. But the fact that the decision involves a small amount of money in no way diminishes the substantial nature of the constitutional question raised by the South Dakota statute. The question of whether the South Dakota limitation is constitutional is the same whether it is raised in a case involving a single sale and a small amount of interest or a case involving thousands of sales and thousands of dollars in interest.

Further, although this case has not been certified as a class action and therefore in its monetary aspect involves only the interest paid by Appellee Peterson, class actions

raising the same issue have already been filed against Spiegel and another interstate catalog seller in South Dakota, and the same issue is raised by statutory limitations in other states. See Jurisdictional Statement at pp. 7, 21.

This Court must face and decide the question of whether the states have unfettered discretion to impose finance charge limitations on interstate credit sales, however severe the impact on interstate sellers, or whether such limitations are subject to the balancing test set forth in this Court's Commerce Clause decisions. The judgment herein that Spiegel must return to plaintiff Peterson all finance charges paid by her because the rate exceeded the then-applicable 12% limitation directly raises this substantial federal question. The amendment of the South Dakota statute to permit an 18% finance charge effective July 1, 1979 (see Jurisdictional Statement at p. 7) has in no way mooted or eliminated the substantial constitutional question presented by such judgment.

Respectfully submitted,

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